



2015

Department of Energy
Acquisition and Project Management Workshop
"Federal Stewardship—Providing the Value Proposition"

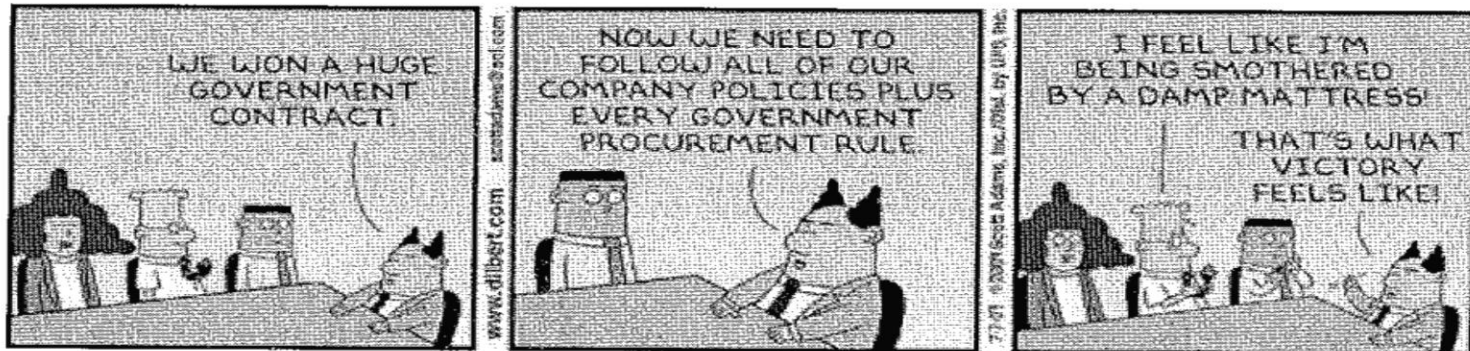
Assistant General Counsel for Procurement and Financial Assistance

Joseph A. Lenhard



The GC Perspective

- What is the Role of the Contracting Officer/Professional?
 - A Contracting Officer means “a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings....”
 - Is this all there is?





“Protest Fear Factor”



**A Whole Lot of
Something?**

{OR}



**Much Ado About
Nothing?**

- GAO Bid protests FY 2014: 2,458
- Court of Federal Claims Bid Protests FY 2014: 110
- GAO Hearings FY 2014: 42 hearings
- Department of Energy GAO Protests FY 2014: 24
- Department of Energy GAO Merit Decisions: 15



“Protest Fear Factor”

Run, don't walk, to the nearest exit....

- What are the areas for protest?
 - Discussions
 - Not evaluating or Evaluating too much
 - Not documenting the evaluation
- When should a CO be concerned?
- What should a CO do?





Favored Evaluation Criteria

- Past Performance
 - The Adapting Offeror
 - The Great Equalizer or Ultimate Discriminator?
 - How about a side order of Corporate Experience?
- Key Personnel
 - Often, a large portion of the evaluation criteria
 - Do we get the most qualified personnel?



The Never-Ending Search for Leverage

How Can DOE Hold Its Contractors Accountable?

- Clawback/Provisional Fee (Used on some DOE contracts)
 - DOE pays fee, but may “clawback” the fee if performance measures are not met for the project
- Fixed Price Contracting/Chunking
 - Difficult where our requirements are not known/sites are not characterized, etc.
 - Consider breaking requirements into “chunks” that can be separately priced on a fixed price basis – use CLINs



The Never-Ending Search for Leverage

How Can DOE Hold Its Contractors Accountable?

- Cost Caps/Shared Costs
 - Used as a way to shift risk to the contractor and limit DOE's cost exposure for a project.
 - Subject to requests for equitable adjustment to change/raise the cost cap
 - Contractors often not agreeable to these arrangements

SPRU Contract Between DOE and URS

- DOE pays 100% of allowable costs up to \$105M
- DOE shares costs with contractor on a 50%-50% basis for allowable costs of \$105M-\$145M
- DOE pays no costs for allowable costs over \$145M



The Never-Ending Search for Leverage

Contractor Business Systems Rule (Non-M&O Contractors) NOPR - 79 Fed. Reg. 18416 (April 1, 2014)

Clarifies requirements for 5 contractor business systems

- (1) Estimating System
- (2) Purchasing System
- (3) Earned Value Management System (EVMS)
- (4) Accounting System
- (5) Property Management System



The Never-Ending Search for Leverage

Contractor Business Systems Rule (Non-M&O Contractors) NOPR - 79 Fed. Reg. 18416 (April 1, 2014)

Business System Clause

- Allows CO to withhold a percentage of payments, under certain conditions, when a contractor's business system contains significant deficiencies
- Withhold 5% of interim payments, progress payments, or performance-based payments for one deficient system, and up to 10% for multiple deficient systems
- If deficiencies remain at contract closeout payments withheld for that contract will be released
- Release of payments at closeout does not constitute approval of a deficient system



Definitions & Procedure

- Significant deficiency means a shortcoming in the system that materially affects the ability of officials of DOE to rely upon information produced by the system that is needed for management purposes.
- Procedure
 - Audit and CO determination of significant deficiency
 - Contractor has 30 days to respond
 - CO makes final determination (not CDA final decision)
 - If CO determines there is significant deficiency – contractor has 45 days to correct or submit acceptable corrective action plan
 - If system remains deficient after 45 days CO will withhold payments or fee



Authority to Manage Supply Chain Risk

	DOD	IC	DOE
CITATION	FY 2011 NDAA § 806 (PL 111-383), 124 Stat. 4137 (2011)	FY 2012 Intelligence Authorization Act § 309 (PL- 112-87), 125 Stat. 1876 (2012)	FY 2014 NDAA § 3113 (PL 113-66), 127, Stat. 672, 50 U.S.C. § 2786
EXCLUDE SOURCES	YES	YES	YES
LIMIT DISCLOSURE	YES	YES	YES
DELEGATION OF AUTHORITY	YES, with limitation	YES, with limitation	YES
WHO MAKES DETERMINATION	Head of a Covered Agency or delegate, but not below the Service Acquisition Executive	Head of a Covered Agency or delegate, but not below the Service Acquisition Executive	Secretary or Delegate



Authority to Manage Supply Chain Risk

	DOD	IC	DOE
FEDERAL COURT Jurisdiction	NO	YES	NO
GAO Protest Jurisdiction	NO	YES	YES
GAO AUDIT Review	NO	NO	YES
CONGRESSIONAL NOTIFICATION	YES	YES	YES
NOTIFY OTHER AGENCIES	YES	NO	YES
SUNSET	September 30, 2018	September 30, 2018	July 23, 2018



Federal IT Acquisition Reform

- National Defense Authorization Act (Sections 831-837) – Federal Information Technology Acquisition Reform Act
- A covered agency may not enter into a contract or other agreement for information technology or information technology services, unless the contract or other agreement has been reviewed and approved by the Chief Information Officer of the agency
 - Approval by the CIO
 - Approval by a governance processes where CIO a full participant
 - Approval by a person one-level below the CIO, but only for “Non-Major Information Technology Investments”
- “Information Technology” and “Non-Major Information Technology Investments” are both defined by OMB



Changes to Small Business Goals

Sec. 318 of the FY2014 Omnibus Bill; Amended Section 15(g) of Small Business Act

(3) First tier subcontracts that are awarded by Management and Operating contractors sponsored by the Department of Energy to small business concerns, small businesses concerns owned and controlled by service disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women, shall be considered toward the annually established agency and Government-wide goals for procurement contracts awarded.

- This change ONLY pertains to those contracts officially sponsored as DOE Management and Operating contracts
- Only applies to “first tier” subcontracts
- Implementation in progress



What's My Perspective?

- Situational Awareness is Key
- Understanding the Broader DOE
- Being the “Contracting Officer-Adviser”
- Protecting the Taxpayer Interests Consistent with the Contract
- Knowing the Contract – Knowing the Project



Dilbert.com DilbertCartoonist@gmail.com



7-13-13 © 2013 Scott Adams, Inc./Dist. by Universal Uclick

